SUBJECT INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1967

Nos. 60, et al.

FEDERAL POWER COMMISSION, *et al., Petitioners*

v.

SUNRAY DX OIL COMPANY, *et al., Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR PAN AMERICAN PETROLEUM CORPORATION

Pan American Petroleum Corporation (Pan American or Movant herein) is a Respondent in Nos. 227 and 415, this Term, cases in which the sole question is whether the Federal Power Commission (Commission) has power to order retroactive refunds under unconditioned temporary certificates. Because of the critical interest of Movant in this single issue, it respectfully moves[1] for leave to file a brief *amicus curiae* pursuant to Rule 42 of the Rules of this Court. Such a brief *amicus curiae,* annexed hereto, is limited to one phase of the retroactive refunds

[1] Movant contacted all parties in Nos. 60-62, 80 and 97 and sought, but could not obtain, unanimous consent to file the attached brief *amicus curiae.*

issue before the Court in Nos. 60-62, 80 and 97,[2] this Term — the effect of earlier, contrary "declared law" on an assumed[3] power in the Federal Power Commission to order retroactive refunds. The question considered in the brief *amicus curiae* may be summarized as follows:

> Assuming *arguendo* the validity of *Skelly*[4] — a Court of Appeals decision handed down on January 23, 1964 — is the Commission nevertheless prohibited from ordering retroactive refunds pursuant to that case in the instance of unconditioned temporary certificates issued prior to January 23, 1964, when the contrary "declared law" of *Sunray Mid-Continent*[5] prevailed and was in force?

This question requires an affirmative answer. In support of the instant Motion, Movant respectfully states as follows:

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It is a virtual certainty that resolution of the retroactive refunds issue before the Court in Nos. 60, *et al.*, will be disposi-

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[2] The threshold question of power to order retroactive refunds is present in Nos. 60-62, 80 and 97, while in Nos. 80 and 97 the question regarding the manner of exercise of this power may be reached if the Court finds that this power actually resides in the Commission. The retroactive refunds issue is not before the Court for review in Nos. 111, 143, 144 and 231, the remaining related, consolidated cases before the Court.

[3] While the attached brief *amicus curiae* assumes for the sake of argument that the Commission possesses the power to order retroactive refunds under unconditioned temporary certificates, there is no intention here to concede in any other respect that such plenary power has been arrogated to the Commission. *Cf. Public Service Commission of New York v. Federal Power Commission*, the *Skelly* case, cited below.

[4] *Public Service Commission of New York v. Federal Power Commission*, 329 F. 2d 242 (CADC, 1964), *cert. denied*, 377 U.S. 963 (1964), known as the *Skelly* case.

[5] *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 270 F. 2d 404 (CA 10, 1959).

tive of the identical issue in Movant's cases. At issue are retroactive refunds of more than $500,000.00 which Petitioners seek to impose on Movant in Nos. 227 and 415. The nature of Movant's interest in Nos. 60-62, 80 and 97 therefore involves a substantial monetary concern which is rooted in the resolution of the retroactive refunds issue.[6]

II

Although the "declared law" issue is equally applicable in Nos. 60-62, 80 and 97, this aspect of the retroactive refunds question was not developed in briefs to the Court of Appeals, and was not considered in the respective Court of Appeals decisions regarding Nos. 60-62,[7] and Nos. 80 and 97.[8] Movant, on the other hand, briefed and also argued "declared law" in the Court of Appeals.[9] Significantly, the decision below in Nos. 227 and 415 was responsive to this presentation, and the Court of Appeals recognized the doctrine of "declared law" in meeting contentions which, in the Court's language, would cause " . . . a turning away from years of Commission assurances and from what was believed to be settled judicial interpretation" and

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[6] Reference is also made to the annexed brief *amicus curiae*, for further information concerning Movant's interest.

[7] *Sunray DX Oil Company, et al. v. Federal Power Commission*, 370 F. 2d 181 (CA 10, 1966).

[8] *Standard Oil Company of Texas, et al. v. Federal Power Commission*, 376 F. 2d 578 (CA 10, 1967).

[9] The "Brief for Petitioner" of Pan American Petroleum Corporation, Case Nos. 7912 and 7962, United States Court of Appeals for the Tenth Circuit, covered this argument on pp. 24-26. Counsel for Pan American also argued the "declared law" doctrine before the Court of Appeals.

violations of "fundamental notions of due process." *Pan American Petroleum Corporation, et al. v. Federal Power Commission,* 376 F. 2d 161, 172 (CA 10, 1967).

III

The relevance of the "declared law" issue is manifest, since it may be decisive in the resolution of the retroactive refunds issue in the consolidated cases and in Nos. 227 and 415. Movant anticipates, moreover, that the "declared law" doctrine will not be considered in any other brief. Movant believes, therefore, that its brief *amicus curiae* will contribute greatly to a full and adequate understanding of the retroactive refunds issue in the consolidated cases.

WHEREFORE, for the foregoing reasons, Movant respectfully moves for leave to file the attached brief *amicus curiae* in the consolidated cases.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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BRIEF AMICUS CURIAE OF PAN AMERICAN PETROLEUM CORPORATION

I. INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the motion to which this Brief is attached. Further information concerning this interest appears in the Argument, below.

II. QUESTION PRESENTED

The sole question presented in this brief *amicus curiae* may be stated in general terms as follows:

> Assuming *arguendo* the existence of power in the Federal Power Commission to order retroactive refunds under unconditioned temporary certificates, is the Commission nevertheless prohibited from exercising such power, when, at the time temporary certificates were issued, a contrary "declared law" regarding the Commission's power prevailed and was in force?

Or, putting this same question in more concrete terms, it would be stated as follows:

> Assuming *arguendo* the validity of *Skelly*[10] — a Court of Appeals decision handed down on January 23, 1964 — is the Commission nevertheless prohibited from ordering retroactive refunds pursuant to that case in the instance of unconditioned temporary certificates issued prior to January 23, 1964, when the contrary "declared law" of *Sunray Mid-Continent*[11] prevailed and was in force?

The position of *amicus curiae* (hereafter called "Movant") is that an affirmative answer must be given to both versions of this one question.

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[10] *Public Service Commission of New York v. Federal Power Commission*, 329 F. 2d 242 (CADC, 1964), *cert. denied*, 377 U.S. 963 (1964).

[11] *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 270 F. 2d 404 (CA 10, 1959).

III. STATEMENT OF "DECLARED LAW" DOCTRINE

The Commission found that it had the power to order refunds under the wholly unconditioned temporary certificates at issue in Movant's cases and in Nos. 60-62, 80 and 97. Such Commission action was grounded in *Skelly, supra,* which Movant believes is an erroneous appraisal of Commission power. However, even if *Skelly* represents the correct view of Commission power — that the Commission as a general matter may exact refunds in the absence of an explicit warning condition in the temporary certificate — such power must be limited and restricted to *prospective* exercise only, *i.e.,* to the ordering of refunds under temporary certificates issued *after* January 23, 1964, the date of the Court of Appeals decision in *Skelly,* when *Skelly* changed the pre-existing "declared law" of *Sunray Mid-Continent, supra.* Assuming *arguendo* the correctness of *Skelly,* the change in "declared law" effected by that case may not be applied retroactively to temporary certificates issued *before* January 23, 1964, under the aegis of pre-existing law expressed in *Sunray Mid-Continent.*

IV. RATIONALE OF "DECLARED LAW" DOCTRINE

The retrospective application of *Skelly* by the Commission transgresses fundamental concerns with fairness and due process of law in administrative practice, and the court below so held. The requirement of due process of law protects parties who committed their gas to the regulated market in reliance upon repeated assurances from the Commission, amplified by *Sunray Mid-Continent,* concerning the evident absence of refund liability. This protection continues even though, some years later, the Commission seeks to repudiate these assurances by applying *Skelly* retroactively, belatedly concluding that *Sunray Mid-Continent* was wrong.

Aside from the requirement of due process of law, the retroactive application of *Skelly* cannot stand here. The application of *Skelly* to past conduct in other proceedings, as attempted by the Commission in the instant cases, amounts to a grave abuse of agency discretion. Factual analysis shows that the Commission has not met standards that are required to achieve sound, reasonable regulation. Here, the impact and real meaning of employing *Skelly* retroactively is expressed in terms of arbitrary, capricious, and unlawful action by an agency in flagrant abuse of its discretion.

V. SUMMARY OF "DECLARED LAW" ARGUMENT

A. Movant's temporary certificate was issued as a "no refund condition" instrument, without predicate for the ordering of refunds during the period of temporary authority. This was abundantly clear from existing construction, revealed by administrative holdings and the *Sunray Mid-Continent* decision. In reliance upon its "no refund condition" temporary certificate, Movant committed its gas to the regulated market, justifiably considering its gas receipts to be free from refund obligation. Movant relied upon existing "declared law" concerning the nature of its temporary certificate, and incurred exploration, production, and other expenses on the strength of firm revenues.

It was only in December, 1962, when a motion was filed to subject Movant's temporary certificate to refund conditions, that any serious question arose concerning Movant's refund liability. The Commission denied this motion on February 5, 1963, holding that receipts under the temporary certificates there at issue were firm and not subject to refund obligation.

Less than one year after the decision of February 5, 1963, the Court of Appeals handed down the *Skelly* decision on January 23, 1964. The *Skelly* decision was the first precedent for the ordering of refunds under unconditioned temporary certificates, but it did not decide the major question of whether any later change in "declared law" as expressed in *Skelly* must be limited to prospective applicability only, *i.e.,* to temporary certificates issued after the date of that decision.

The Commission, on July 23, 1964, on the basis of *Skelly*, found in Opinion No. 436 that it had the power to order refunds under Movant's unconditioned temporary certificate.

The Court of Appeals reversed the Commission, holding that the Commission lacked the statutory power to order refunds; the Court, in addition, held that the application of the later "declared law" of *Skelly* to Movant would violate "fundamental notions of due process." *Pan American Petroleum Corp., supra,* 376 F. 2d at 172.

B. In the early days of our jurisprudence, it was conceived that tribunals did not have the power to deny retroactive effect to their decisions. But this restriction on power no longer exists; for it is well settled that the forum is not so limited. There is thus no requirement that new "declared law" overruling a previous holding must be applied retroactively. *Linkletter v. Walker,* 381 U.S. 618 (1965); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940); *Warring v. Colpoys,* 122 F. 2d 642 (CADC, 1941).

Indeed, to prevent injustice or a denial of due process of law in other proceedings, not only *may* the tribunal restrict the retroactive effect of the new "construction," but in the proper case it is *obligated* to do so. See, in addition to other cases cited, *Linkletter v. Walker,* 381 U.S. at 636; and *Chicot County Drainage* District v. Baxter State Bank, 308 U.S. at 374.

The *Chicot County* doctrine extends to administrative actions

taken under Federal Statutes. Where grave injustice or a denial of due process in other proceedings would result from retroactive application of the administrative action, the new construction must be confined to prospective effect. See, *e.g., Safarik v. Udall,* 304 F. 2d 944 (CADC, 1962), *cert. den. sub nom. Hansen v. Udall,* 371 U.S. 901 (1962); and *NLRB v. International Brotherhood of Teamsters,* 225 F. 2d 343 (CA 8, 1955).

The "declared law" doctrine applies fully to administrative action taken by the Federal Power Commission under the Natural Gas Act. See, *e.g., City of Chicago v. Federal Power Commission,* No. 19,604 (CADC, September 8, 1967). In *City of Chicago, supra,* the Commission expressly overruled previous decisions regarding the proper depreciation allowed pipelines under the Natural Gas Act, but applied this new holding with prospective effect only. The Court of Appeals expressly approved this treatment and held that the Commission thereby observed basic due process concerns of fairness and justice.

C. The Commission, in related refund orders pertaining to unconditioned temporary certificates, recognized the existence of the general problem presented by the change in "declared law" effected by *Skelly.* However, this recognition was limited to certain relatively minor sums involving royalties and production taxes; the real meaning and effect of the refund orders, therefore, was to treat *Skelly* as having been in effect, continuously, from the issuance of temporary certificates, forward. The refund orders ignored all that happened prior to *Skelly;* they ignored the prior "declared law" revealed by *Sunray*

Mid-Continent; they ignored the unambiguous, contrary Commission decision of February 5, 1963.

The correct application of the cited authorities demands that *Skelly* be applied prospectively only, *i.e.,* to temporary certificates issued after January 23, 1964. There can be no warrant for ordering any refunds whatever under unconditioned temporary certificates issued prior to the date that the changed "declared law" of *Skelly* was spoken by the Court of Appeals. The "interest of justice" would be subverted and due process of law transgressed by applying *Skelly* to Movant's temporary certificate.

The practical effect of Movant's argument would not have wide application in other proceedings. *Skelly,* assuming *arguendo* its correctness, would apply to the temporary certificates in that case and to all other temporary certificates issued after January 23, 1964. There would be but a restricted number of existing temporary certificates to which Movant's argument could apply.

Moreover, the potential refund period to which Movant's argument pertains is a relatively brief period, running from the date of initial deliveries to the date of issuance of permanent certificates. This is simply a non-recurring, "locked-in" period of potential refund liability.

D. The "declared law" doctrine must be applied here. The producers and pipelines relied upon their unconditioned temporary certificates and expended funds in reliance thereon. Previously, in its order of February 5, 1963, the Commission found it would be contrary to the public interest to engraft

refund conditions on unconditioned temporary certificates; the Commission unequivocally refused to sanction entrapment. The reasoning in the Order of February 5, 1963, is no less pertinent today.

The application of the "declared law" doctrine here will have no untoward effects for the future. The industry is "on notice" of *Skelly* as to unconditioned temporary certificates issued after January 23, 1964. In all events, the Commission has eliminated the instant problem by requiring the inclusion of *express* refund conditions in all new temporary certificates.

Changes in interpretation are inevitable in the administrative process, but an absence of restraint in retroactive decision-making will over the long term impair administrative flexibility.

The considerations advanced with respect to price stability and reliance for business planning purposes are important to the gas industry. While the gas producer must recognize the pricing risks inherent in his regulated activity, he should be able at any given time to assess the risk on the basis of written Commission orders in the context of the "declared law" then prevailing. The alternative is chaos and confusion in the agency and industry alike.

VI. "DECLARED LAW" ARGUMENT

A. Introduction

Movant and other producers in Nos. 227 and 415 were issued unconditioned temporary certificates over a period of several years, ending in 1962, and, during this entire period, these unconditioned authorizations by virtue of commission interpretation were indisputably "no refund condition" documents, without predicate, under the law, for the ordering of refunds for deliveries of gas made prior to the date of permanent certification.[11] See *Coastal Transmission Corp.*, 26 FPC 677, 683 (1961); *Skelly Oil Co.*, 28 FPC 401, 413 (1962), 28 FPC 1065, 1069 (1962); *Placid Oil Co.*, 30 FPC 283, 293 (1963); *Amerada Petroleum Corp.*, 31 FPC 647, 674 (1963); and *Union Texas Petroleum*, 32 FPC 279, 315-316 (1964). Contemporary judicial authority was no less clear.

Thus, in *Sunray Mid-Continent*, decided in 1959, the producer was tendered a temporary certificate expressly drawn "subject to *any* conditions with respect to price which the Commission may lawfully impose in issuing a [permanent] certificate of public convenience and necessity in this Docket." 270 F. 2d 404 at 407-408 (emphasis supplied). The producer-applicant

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[11] As early as 1955, the Commission issued a permanent certificate to an independent producer at a lower price than was provided in its precedent temporary certificate; however, the Commission did not seek to impose refunds for deliveries made under temporary authority. *Cities Service Gas Company*, 14 FPC 134 (1955), aff'd. *sub nom., Signal Oil and Gas Company v. Federal Power Commission*, 238 F. 2d 771, 773 (CA 3, 1956), *cert. den.*, 353 U.S. 923 (1957).

was also required to indicate its willingness to file a bond to assure the eventual refund of receipts down to whatever price level was finally determined to be proper when permanent certification occurred.

The Court in *Sunray Mid-Continent* held that, while the Commission had broad power under Section 7(e) of the Natural Gas Act to condition temporary certificates, such broad power was by no means an absolute power; the conditional acceptance of a certificate application "must be in accord with the provisions of the Act and must meet the test of constitutional due process." The Court held that the producer-applicant under Section 7 of the Act "has the free choice to accept or reject" a temporary certificate tendered by the Commission, and that he has the right:

> " . . . to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: 'Sell your gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond'." (270 F. 2d at 409).

The Court proscribed this indefinite, speculative approach of the Commission which sought to impose an uncertain, "floorless" rate under the temporary certificate, and, accordingly, ruled that the Commission was required to take action upon requests for temporary certificates "with such certainty as to allow the exercise of choice." Certainty and definiteness were set as criteria limiting the Commission's broad discretion to condition temporary certificates. Indeed, these two requirements must be satisfied be-

fore the Commission's action "meet(s) the test of constitutional due process." 270 F. 2d at 409.

When actually tendered to the producer in, and as a part of the temporary certificate, an express condition of the type under review in *Sunray Mid-Continent* is invalid because it does not meet the criteria of certainty and definiteness. Such a condition is invalid, *a fortiori,* when, as here, it is imposed by the Commission by implication and with retroactive effect, to modify the terms of the original temporary certificate upon which the "exercise of choice" to submit to regulation was based.

In reliance upon its "no refund condition" temporary certificate, Movant accepted such authorization, commenced deliveries of gas in interstate commerce and thereby committed its natural gas reserves to the regulated market.[13] From the standpoint of contemporary law, Movant was fully justified in considering all of its receipts to be firm and free from refund obligation. From the standpoint of public statements by Commission officials, Movant was no less reassured.[14] Accordingly, royalties were paid on the basis of the prices set forth in the temporary certificate.[15]

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[13] Once having commenced deliveries in interstate commerce, the producer may not cease deliveries of gas without the permission of the Commission. See Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b).

[14] Joseph C. Swidler, while Chairman of the Commission, stated in an address to the American Petroleum Institute on November 15, 1961, that temporary certificates without refund condition were intended to "authorize initial sales on a firm basis" so that "producers may know that all of the new initial price is theirs to keep . . . "

[15] Individual, fractional royalty interests, although involving large sums in the aggregate, often each involve relatively small amounts which cannot justify efforts directed to collection of "excess" sums paid out by the producer.

Movant also relied upon existing law and the unconditioned nature of its temporary certificate in planning, budgeting and financing its exploration, development and production activities.[16] Drilling and operating expenses were incurred in reliance upon the contemporary construction that no contingency as to price was involved. Income and other taxes measured by receipts were paid on the basis of firm receipts from gas sales.

Only in December, 1962, when certain intervenors filed a motion to impose refund conditions on Movant's unconditioned temporary certificate, did any serious contention arise concerning the existence of potential refund liability on the part of Movant. This motion, and the novel contention presented thereby, were dispatched by the Commission on February 5, 1963,[17] without ambiguity or equivocation, on the basis of current administrative policy and existing law "declared" by *Sunray Mid-Continent.* The Commission, in *Area Rate Proceeding, et al.,* Docket No. AR61-2, *et al.,* Order Denying Motion to Impose Price Conditions in Temporary Certificates, 29 FPC 223 (1963), stated as follows:

> "Petitioner's proposal in other words comes down to little more than an argument that we should unilaterally impose a new refund commitment upon the producers. *This*

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[16] Movant was not required to, and did not in fact, report receipts under its unconditioned certificate as collected subject to potential refund obligation. Compare the reporting procedures required by Section 4(e) of the Natural Gas Act, 15 USC 717c(e); see in this regard Section 154.102(c) of the Commission's Regulations Under the Natural Gas Act, 18 CFR 154.102(c).

[17] A similar order, also issued on February 5, 1963, affects sales in Nos. 60, *et al.;* refer to *Amerada Petroleum Corporation, et al.,* Docket No. CI62-1544, *et al.,* Order Denying Motion to Impose Price Conditions in Temporary Certificates, 29 FPC 218 (1963).

> *we will not do.* * * * Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the public interest to approve any such abandonment request, we would be in a position of having induced the producers *to dedicate their gas to market upon one set of conditions, and then imposing more stringent conditions upon them.* Such a course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon [the producers'] part.' *Sunray Mid-Continent Oil Company v. F.P.C.,* 270 F. 2d 404. *Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy"* (29 FPC at 225) (emphasis added).

Significantly, the Commission, while describing its view of the temporary certificates before it on February 5, 1963, stated that "The initial price would, however, continue to be collected until a *prospective* price could be determined after hearing . . ." (29 FPC at 224) (emphasis added).

The *Skelly* case, handed down by the Court of Appeals for the District of Columbia Circuit on January 23, 1964 — less than one year after the Commission's Order of February 5, 1963 — furnished the first precedent for the ordering of refunds under unconditioned temporary certificates.[11] *Skelly* held that, while

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[11] The "Brief for Respondent Federal Power Commission," filed in the *Skelly* case in July, 1963, reflected the Commission's appraisal of the state of authority on this point:

> "The history of Commission producer regulation with respect to temporary authorizations clearly shows, however, that a producer in accepting unconditioned temporary authorizations such as those involved here would have had no reason to asume that they might later be required to make refunds for the period that the temporary authorizations were in effect." (Brief for Respondent Federal Power Commission, *Public Service Commission of the State of New York v. Federal Power Commission,* Case Nos. 17582, et al., CADC, page 29).

the Commission had the power to order refunds, the exercise of such power was not mandatory, but was bottomed in each individual case upon "equitable considerations." 329 F. 2d at 250.

Skelly did not, however, actually decide the major question of whether any later change in "declared law" as expressed in *Skelly* must be limited to prospective applicability only, *i.e.,* to temporary certificates issued after the date of the decision, January 23, 1964. *Skelly* itself only disposed of the temporary certificates there at issue.

In Movant's cases, the "declared law" doctrine is brought into focus as a legal issue because of the Commission Opinion of July 23, 1964, in *Union Texas Petroleum, et al.,* Docket No. G-13221, *et al.,* Opinion No. 436, 32 FPC 254 (1964). In Opinion No. 436, the Commission on the basis of *Skelly* found that it had the power to order refunds. 32 FPC at 265. While the Commission held that it would invoke this power only after an examination of the "equities," and reserved the actual ordering of refunds until a later date, the Commission nevertheless made it clear to the producers, by action taken in related cases, that the "excess" collections did not belong to them and that any "equities" would effect, at most, a partial and relatively modest reduction in refunds."

The Court of Appeals found that the *Skelly* decision did not govern collateral proceedings — the earlier Commission assurances and contrary judicial interpretation could not be ignored

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" See the discussion, *infra,* on this point.

of the last year of the extended term of such leases. The lessees relied upon a previous memorandum opinion of the Associate Solicitor of the Department of the Interior, which stated that such an assignment would effect a further two-year extension of the lease term under the Mineral Leasing Act. The appellants filed applications for leases which covered the same lands included in the assigned leases. Almost a year after the Associate Solicitor's ruling, the Secretary of the Interior held that, in order to effect a lease extension, an assignment had to be filed *before* the twelfth month of the last year of the extended term; an assignment filed *during* the twelfth month of the last year of such term was ineffective to extend the lease, and it terminated under the new construction of the governing statute, the Mineral Leasing Act, at the end of the twelfth month. While the Solicitor's opinion was thereby overruled, this overruling was expressly limited to prospective application, and the Court approved such treatment. The Court further observed that parties regulated by a Federal agency must rely upon administrative action taken by that agency in interpreting the governing statute:

> "Necessarily, persons who have acquired oil and gas leases of public lands from the United States, in making assignments or subleases to other persons, in obtaining extensions of such leases, in performing the terms of such leases, in entering into contracts with third persons with respect to the exploration and devolpment of such leases, in incurring liabilities and making expenditures in connection with the exploration, development and operation of such leases and in otherwise acting with respect to such leases, must in most cases act and rely upon interpretative regulations promulgated by, and decisions and opinions of the Depart-

ment of the Interior interpreting applicable statutes and regulations, . . . " (304 F. 2d at 949).

Finally, the Court in *Safarik* enunciated the view that:

" . . . courts ordinarily will give prospective effect only to a decision overruling prior decisions where persons have contracted, acquired rights, or acted in reliance on the prior decision, and the operation of the later decision retroactively would result in substantial harm to such persons." (304 F. 2d at 949-950) (Footnote omitted).

In *NLRB v. International Brotherhood of Teamsters,* 225 F. 2d 343 (CA 8, 1955), the union in its contract with the employer contractually reserved the right to settle all disputes relating to seniority. The NLRB declared such a reservation to be invalid and contrary to the terms of the National Labor Relations Act, notwithstanding a prior, outstanding case to the contrary decided by the NLRB, involving different parties; accordingly, the NLRB found the union to be guilty of an unfair labor practice. The Court indicated that the agency could, upon notice, make any prospective general pronouncement concerning the governing statute which it saw fit; however, it set out the caveat that the Board could not retroactively find a party's conduct to constitute an unfair labor practice, in contradiction to its own express, unrenounced holding (225 F. 2d at 348). Then, the Court expressed its view of the Agency's rulings from the standpoint of the purposes of the Federal Act involved, the position of the Agency, and the role of the regulated employer and union. In holding that the NLRB could not retroactively charge the Union with an unfair labor practice, the Court stated:

"When the practical purposes of the Act and the commanding control of the Board in their effectuation are considered, it does not seem to us to make either legal or common sense to say that the Board's rulings are wholly without any sanctity under the Act as a guide for employer or union conduct, but that the Act intends that anyone who relies upon and uses the Board's rulings as a basis for his actions shall be left subject to entrapment and branding as the perpetrator of an unfair labor practice in what he has thus done, if the Board thereafter chances, by reason of change in personnel or otherwise, to depart from one of its previous positions and rulings." *Ibid.*

Finally, similar reasoning applies without question to action taken by the Federal Power Commission under the Natural Gas Act.[23]

Thus, in *City of Chicago v. Federal Power Commission*, No. 19,604 (CADC, September 8, 1967), Natural Gas Pipeline Company of America put certain increased rates into effect on March 1, 1961, subject to refund under Section 4(e) of the Natural Gas Act. After a hearing on the lawfulness of these increased rates, a settlement was reached and approved by the Commission. The settlement, however, left open for future determination whether Natural would employ the liberalization or normalization method in calculating depreciation for the income tax component of its rate base. Natural agreed in the settle-

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[23] See *Alabama-Tennessee Natural Gas Co.*, 27 FPC 1180, 1182 (1962), 31 FPC 208, 209, 220 (1964); *Pure Oil Co.*, 25 FPC 383, 389 (1961), affirmed, *Pure Oil Co. v. FPC*, 299 F. 2d 370 (CA 7, 1962) (*prospective* regulation of escalation provisions); *Wisconsin v. FPC*, 373 U.S. 294, 304 (1963); see also *Rejection of Sales Contracts, etc.*, 27 FPC 339 (1962), which was issued on February 8, 1962, and provided for the rejection by the Commission of certain types of contracts executed after April 2, 1962.

ment to abide by any refund order with respect to this reserved issue, subject to its right to seek judicial review.

On February 3, 1964, the Commission issued its Opinion No. 417 in *Alabama-Tennessee Natural Gas Co.*, 31 FPC 208, wherein the Commission decided that liberalized depreciation should be applied to Alabama-Tennessee, as well as to all other "typical pipelines." On March 18, 1965, in Opinion No. 456, *Natural Gas Pipeline Company of America*, 33 FPC 574, the Commission held that Natural was a "typical pipeline" and that the principles of *Alabama-Tennessee* were applicable to it. As to refunds, the Commission determined that Natural should calculate refunds from February 3, 1964, the date of the new construction revealed in the *Alabama-Tennessee* decision.

On Appeal, the City of Chicago contended that Section 4(e) of the Act required the Commission to make its refund order retroactive to March 1, 1961, the effective date of Natural's collection of the increased rates held invalid.

In affirming the Commission, the Court of Appeals held that Section 4(e)[26] of the Act permits the Commission to make its refund order retroactive, but does not require this result. The Court of Appeals described with approval the reasoning of the

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[26] It should be noted that the temporary certificates now before the Court are issued by the Commission under Section 7 of the Act, 15 USC 717(f). The initial rates specified in the temporary certificates thus are not subject to the refund procedures set out in Section 4(e) of the Act, which apply to increased rates only. In *City of Chicago*, the increased rates of Natural were *admittedly* subject to the refund procedures of Section 4(e) of the Act, from March 1, 1961, forward.

in the posture of the producers' cases. *Pan American Petroleum Corporation, et al. v. Federal Power Commission,* 376 F. 2d 161, 171-173 (CA 10, 1967). In answering the Commission's contention that every producer selling gas under an unconditioned temporary certificate should be charged with notice that refunds might be ordered as of the date of the *Skelly* decision, the Court of Appeals stated as follows:

> "Aside from the fact that the *Skelly* decision could directly affect only the parties involved, we think that at that time producers generally still had every reason to believe that such refunds would not be ordered. The decision said that the Commission has the power to order refunds even though temporary certificates do not warn of this contingency, that exercise of this power is not necessarily mandatory, but that when the power is not exercised the record must show the equitable considerations involved. When petition for certiorari was filed by producers a very short time after the decision, the Commission filed a brief in opposition stating that 'it is entirely possible * * * that the Commission, after reviewing all pertinent factors, will again reach the conclusion that refunds are inappropriate.' It is difficult to imagine how a case in this posture could have dictated immediate preparation for a turning away from years of Commission assurances and from what was believed to be settled judicial interpretation." (376 F. 2d at 172) (footnotes omitted).

Finally, the Court pointed out that stability of prices is one of the great objectives of regulation under the Natural Gas Act, but that such objective was not achieved by the retroactive application of *Skelly* to the producers' temporary certificates. In fact, quite the contrary would be accomplished by applying the later "declared law" of *Skelly:*

"It is manifest, however, that price stability is undermined by threats or attempts to fix prices retroactively without prior warning or, even worse, with prior assurances that specifically negate the refund contingency. *Such action not only violates fundamental notions of due process, it also defeats a fundamental purpose for which the regulation was created.*" *Ibid.* (emphasis supplied).

B. Authorities

The effect of an overruling decision or a change in "declared law" has given courts difficulty since the early days of our jurisprudence.[20] In the early decisions it was conceived that tribunals did not have the *power* to deny retroactive effect to their decisions. But this limitation on power no longer exists — it is settled that the forum is not itself bound by legal doctrines of "power." *Linkletter v. Walker,* 381 U.S. 618, 629 (1965). There is thus no requirement that new "declared law" overruling a previous holding must be applied retroactively. *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 374 (1940); *Warring v. Colpoys,* 122 F. 2d 642 (CADC, 1941).

The reasoning underlying the application of changes in "declared law" to prospective transactions only is well expressed in an opinion of the Solicitor of the Department of Interior. In *Franco Western Oil Company, et al.,* 65 I.D. 427 (1958), the Secretary of the Interior declined to give retroactive application to certain provisions of the Mineral Leasing Act, and left undisturbed previous transactions concluded in reliance upon contrary administrative holdings. In quoting with approval an earlier opinion, the Solicitor stated (65 I.D. at 429-430) the following succinct summary of the reasoning on "declared law":

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[20] See, *e.g., United States v. MacDaniel,* 32 U.S. (7 Pet.) 1, 14-15 (1833). See also the discussion in *Warring v. Colpoys,* 122 F. 2d 642, 645-646 (1941), and the quotation from *Franco Western Oil Company* quoted *infra* in the text.

"The fiction that interpretation of laws reveals their eternal meaning has long stood in the way of any such distinction between the prospective and the retrospective application of decisions. But in recent years a more realistic view of the matter has achieved respectability. The Supreme Court has made it clear that nothing in the Federal Constitution or in the nature of the legal process prevents a tribunal from recognizing changing circumstances and laying down a rule for the future different from the rule which it has sustained for the past. Thus the Supreme Court has upheld the validity of a State court decision which lays down for the future a rule different from that applied in the past. The Supreme Court itself has, on occasion, laid down a new rule of law for the future while recognizing the propriety of a different rule in the past. The Supreme Court has likewise recognized the propriety of an administrative decision which lays down a new rule for the future without detracting from the validity of a different rule applied in the past." (Footnotes omitted)

This persuasive Opinion was sustained on appeal. See *Safarik v. Udall,* 304 F. 2d 944 (CADC, 1962), *cert. den. sub nom., Hansen v. Udall,* 371 U.S. 901 (1962), discussed *infra.*

To prevent injustice or a denial of due process of law in other proceedings, not only *may* the tribunal restrict the retroactive effect of the new "construction," but, indeed, in the proper case it is *obligated* to do so.[21] Thus, in *Chicot County Drainage District v. Baxter State Bank, supra, it* was stated that:

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[21] See, in addition to the other cases cited in the footnotes and text of this Section of this Brief, the following: *Great Northern R. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358 (1932); *State ex rel. Williams v. Whitman,* 116 Fla. 196, 156 So. 705 (1934); *Bassi v. Langloss,* 22 Ill. 2d 190, 174 N.E. 2d 682 (1961); *Gibbons v. Pan American Petroleum Corp.,* 262 F. 2d 852 (CA 10, 1958); *James v. United States,* 366 U.S. 213, 221-222 (1961); *Montana National Bank v. Yellowstone County,* 276 U.S. 499, 504 (1928); and *Nordstrom v. U.S.,* 360 F. 2d 734 (CA 8, 1966).

> "The past cannot always be erased by a new judicial declaration. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of the statute and of its previous application, demand examination." (308 U.S. at 374).

In *Linkletter v. Walker, supra,* this Court applied the rule stated in *Chicot County* to an express overruling situation, where *Wolf v. Colorado,* 338 U.S. 25 (1949), the "Wolf case," was overruled by *Mapp v. Ohio,* 367 U.S. 643 (1961), referred to as the "Mapp Case."[22] Linkletter, a state prisoner whose judgment of conviction had become final before the *Mapp* case, attacked the earlier judgment by way of *habeas corpus* proceedings. This Court expressed the considerations inhering in a change of "declared law" in terms of *Chicot County,* supra, and then summarized these considerations by stating that "we must look to the purpose of the Mapp rule; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of a retroactive application of Mapp." (381 U.S. at 636).

After finding that the purpose of the *Mapp* rule would not be advanced by making it retroactive, the Court noted that reliance was placed upon the earlier *Wolf* doctrine, both by the prosecution and the accused. Then, the Court, in concluding that retroactive application of the later case would not be made, stated that "there are interests in the administration of justice

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[22] *Mapp* held that the exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment to the Federal Constitution was required of the states by the due process clause of the Fourteenth Amendment. *Wolf* had earlier failed to apply this exclusionary rule to the states.

and the integrity of the judicial process to consider" (361 U.S. at 637), and, finally, "[t]o make the rule of Mapp retrospective would tax the administration of justice to the utmost." *Ibid.*

The *Chicot County* doctrine, well illustrated in *Linkletter, supra,* is by no means confined to cases involving criminal prosecution,[23] but applies as well to administrative actions taken under Federal Statutes. Where grave injustice or a denial of due process in other proceedings would result from retroactive application of the administrative action, the new "construction" must be confined to prospective effect. *Leedom v. International Brotherhood,* 278 F. 2d 237 (CADC, 1960); *Chapman v. El Paso Natural Gas Co.,* 204 F. 2d 46 (CADC, 1953);[24] *NLRB v. E & B Brewing Co.,* 276 F. 2d 594 (CA 6, 1960); *New Castle County Airport Comm. v. CAB,* 371 F. 2d 733 (CADC, 1966); *NLRB v. Majestic Weaving Co.,* 355 F. 2d 854 (CA 2, 1966); *Ringsby Truck Lines, Inc. v. U. S.,* 263 F. Supp. 552 (D. Colo., 1967); see also *Safarik v. Udall* and *NLRB v. International Brotherhood of Teamsters,* both discussed *infra.*

Thus, in *Safarik v. Udall,* cited *supra,* Federal oil and gas lessees under the Mineral Leasing Act filed assignments of their leases with the Secretary of the Interior *during* the twelfth month

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[23] In *Linkletter,* the court stated: "That no distinction was drawn between civil and criminal litigation is shown by the language used . . . in . . . *Chicot County, supra.*" (381 U.S. at 627).

[24] In decrying the attempted departmental repudiation of an earlier decision "for the sole purpose of applying some quirk or change in administrative policy," the Court in *Chapman* was constrained to point out that " . . . *even the power of executive or administrative agencies is not without limits.*" (204 F. 2d at 54) (emphasis supplied).

Commission in selecting the February 3, 1964, date from which refunds would be ordered:

> "Explaining why its ruling was not made retroactive to the effective date of Natural's rate increase, the Commission stated 'that in *Alabama-Tennessee* we were announcing a new policy and overruling previous decisions. It was therefore not equitable, contrary to the contentions of Chicago, to make our determination effective before February 3, 1964, but on that date the industry was informed of the new policy, and it was appropriate that refunds should be ordered from then.'" (Mimeo. ed., p. 21)

The Court held that "[t]he Commission acted sensibly and reasonably in making its new policy effective as of the date it was announced to the industry." *Ibid.*

To the argument of Chicago that the February 3, 1964, date would permit Natural to retain funds from rates which the Commission had found to be unjust, the Court replied that, prior to such date, Natural's rates were in effect determined to be just and reasonable.

C. What the Doctrine Means

The Commission has recognized in its refund orders relating to unconditioned temporary certificates the existence of the general problem presented by the change in "declared law" effected by *Skelly*.[27] However, the recognition by the Commission of this problem was limited — it extended only to "excess"[28] royalty sums and to "excess" state production taxes, and, in respect of these relatively small items, the Commission acted to excuse refunds prior to February 1, 1964,[29] only. In other words, except for token amounts — considering the total sums involved — complete refunds were ordered of all sums received by the producers above the "in-line" price during the entire period of temporary authority.

February 1, 1964, the date selected in *Hawkins and Hawkins*, Opinion No. 498, and repeated in the succeeding opinions ordering refunds, is admittedly a significant date — it follows the

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[27] See, *e.g.*, *Hawkins and Hawkins*, Opinion No. 498, 36 FPC 149, 151-152 (1966). This decision was followed by similar holdings in *Turnbull & Zoch Drilling Co.*, Opinion No. 499, 36 FPC 164 (1966), *Amerada Petroleum Corp.*, Opinion No. 501, 36 FPC 309 (1966), and *Sun Oil Co.*, Opinion No. 502, 36 FPC 317 (1966). Opinion No. 501 is presently before this Court for review in Nos. 80 and 97.

[28] The Commission uses the term "excess" to describe amounts paid or received during the continuance of temporary authority above the "in line" price ultimately determined at the time of permanent certification; in the case of state production taxes, the term "excess" means the incremental amount, if any, in taxes actually paid the state on revenue received during the period of temporary authority.

[29] The Commission in *Hawkins and Hawkins* arrived at this date by concluding that by February 1, 1964, "every producer can equitably be charged with knowledge that refunds might be ordered" pursuant to *Skelly*, which was handed down on January 23, 1964. (36 FPC at 152).

issuance of *Skelly* by about a week. However, this fact does not serve to confirm the validity of the Commission's opinions ordering refunds; it serves instead to point up the grievous error involved in the typical refund order described above.

The appearance of charity in excusing the refund of relatively minor or inconsequential amounts prior to February 1, 1964, should not obscure the real meaning and effect of the refund orders described above. Stripped of the pretense afforded by "sacrificing" small sums in obstensible deference to the *Chicot County* doctrine, it is plain that the Commission's refund orders really treat *Skelly* as having been in effect, continuously, from the date of issuance of the earliest of the unconditioned temporary certificates, forward. The refund orders in a real sense ignore all that happened before *Skelly;* they ignore the prior "declared law" revealed by administrative construction and by *Sunray Mid-Continent;* they ignore the reliance placed upon the unconditioned temporary certificates issued and accepted by the producers under the prior "declared law"; and they ignore the many reassurances provided the producing industry by the Commission concerning the meaning of unconditioned temporary certificates. Finally, the refund orders are blind to the unambiguous, contrary Commission decision issued on February 5, 1963, the decision in which the Commission forthrightly declined to engraft refund conditions on outstanding unconditioned temporary certificates; any such action, the Commission there stressed " . . . *would so denature the value of a Commission authorization as to place any*

reliance upon our actions in this area in serious jeopardy." 29 FPC 223, 225 (emphasis added).

The correct application of the authorities cited *supra* demands that *Skelly* be applied prospectively only, *i.e.*, to temporary certificates issued after January 23, 1964.[30] The date of issuance of the temporary certificate is the significant, operative fact. A temporary certificate issued prior to January 23, 1964, manifestly was issued under the "declared law" revealed by *Sunray Mid-Continent*, and, in view of this, all funds collected during the continuance of temporary authority (both before and after January 23, 1964) should be considered received under the aegis of that prior "declared law"[31] There can be no warrant for ordering any refunds whatever under temporary certificates issued prior to the date that the changed "declared law" of *Skelly* was spoken by the Court of Appeals for the District of Columbia.

The "interest of Justice,"[32] the inherent and also explicit considerations of equity in *this* case, compels and demands that the rule of *Skelly* be applied prospectively, only, to temporary authorizations issued *after* the date that *Skelly* became a part of our case law. Whatever may be said regarding "power," generally, the *Skelly* case cannot sanction retroactive refunds in Movant's docket, for injustice and a denial of due process of law would

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[30] Or, if preferred, after February 1, 1964, the date selected by the Commission for the limited purposes related *supra*.

[31] See Note 37, *infra*.

[32] 381 U.S. at 628. See *Linkletter v. Walker* cited *supra* in the text.

result thereby, as the court below so held. There is no directive in *Skelly* to apply the rationale of that case retroactively to transactions which were conceived by all concerned to have different legal consequences. There is no directive in *Skelly* to apply the doctrine of that case, robot-like and unthinking, to prior periods of time. Manifestly, there is no directive in *Skelly* to accomplish injustice, for, quite the contrary, *Skelly* called for the equities to be examined "pro and con a refund."

As stated *supra*, Skelly did not consider the controlling question of whether the change in "declared law" enunciated by it must be limited to prospective application only. That question is now ripe for decision in *this case, as to the facts here*, and it is submitted on authority that *Skelly* must be so limited and deemed to have no applicability to authorizations issued *prior* to the decision in that case. The circumstances present here do not permit the Commission to apply the new "construction" of *Skelly* to previous transactions, for, if that were done, due process would be transgressed, equity would be undermined, and the "interest of Justice" subverted.[33]

In considering the practical effect of Movants' argument,

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[33] The Commission's General Counsel did not hesitate to assert in *Skelly* that "[i]n these circumstances, the Commission's conclusion, that it would not be equitable to order refunds here since there had been no refund conditions imposed on the temporary authorizations, was eminently reasonable." (Brief for Respondent Federal Power Commission, *Public Service Commission of the State of New York v. Federal Power Commission*, Case Nos. 17582, *et al.*, CADC, p. 33). *How much less equitable, how much less reasonable, indeed, would it be to order refunds here, under Movant's temporaries in a wholly collateral case, in the wake of the many reassurances provided.*

it should be pointed out that there will not be wide application of the principles here contended for by Movant. The *Skelly* case, assuming *arguendo* its correctness, would apply to the temporary certificates involved in that particular case and to all unconditioned temporary certificates issued after January 23, 1964. Movant's "declared law" argument would apply only to unconditioned temporary certificates issued prior to *Skelly*.

In connection wtih the foregoing, it should be remembered that the issue now before the Court does not involve temporary certificates which are expressly conditioned to require refunds.[34] There are in any case a limited number of unconditioned temporary certificates issued prior to *Skelly* in which the issue here presented to the Court may arise. In all events, the question now before the Court has greatly declined in importance, for it is Movant's understanding that the majority of the pre-*Skelly* temporary certificates without express refund conditions prescribe prices at or below the current "in-line" price which the Commission, in completed proceedings, has already prescribed for the areas in question (and hence would not result in refunds), or are temporary certificates prescribing guideline prices in the very few areas in which the Commission has not yet prescribed "in-line" prices.[35]

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[34] There is no question concerning the propriety of refunds ordered in accordance with a definite and certain *express* refund condition placed in a temporary certificate at the time of its issuance and acceptance.

[35] Additionally, Movant understands that, since the middle of 1964, the Commission has followed the policy of inserting *express* refund condi-

(Continued on Page 36)

Moreover, it should be borne in mind that the potential refund period under unconditioned temporary certificates[36] is a relatively brief period. In Movant's docket, the potential refund period runs from the date of initial deliveries (when Movant's choice became irrevocable by virtue of dedication to market) to July 23, 1964, when permanent certificates were issued in Opinion No. 436.[37] A non-recurring, "locked-in" period of potential refund liability is therefore involved, ending on the date of permanent certification.

Note 35 (Continued)

tions in temporary certificates authorizing sales at prices higher than those prescribed in previously determined "in-line" certificate proceedings. Moreover, it is clear that the Commission has unquestionably eliminated the ruling below with respect to all new temporary certificates, since it now requires the inclusion of *express* refund conditions pursuant to Commission general order (Order No. 336, Docket No. R-316, issued February 9, 1967). The issue before the Court, then, will not arise in temporary certificates hereafter issued.

[36] Although the Commission depicts the issue here involved as bearing upon its power to condition *permanent* certificates (FPC Petition in No. 60, pp. 10-11), the real meaning and effect of what the Commission proposes to do is to amend and condition final *temporary* certificates, retroactively. *Cf. FPC v. Hunt*, 376 U.S. 515, 523 (1964). The actual condition asserting the power to order refunds *does* appear in Movant's permanent certificate, but this condition plainly relates in practical effect to deliveries of gas under the precedent temporary certificate (32 FPC 254, 265, 273).

[37] After July 23, 1964, the date when permanent certificates were issued, the "in-line" price derived for Movant's docket will apply, prospectively, until the date that area rate levels are established for the Commission pricing area involved. (Under the principles and atuhorities here urged, refunds will not be ordered for deliveries of gas by Movant *prior* to July 23, 1964; after such date, Movant's price, as stated, will be determined by the final "in-line" price derived for Movant's docket).

D. Policy Supports the Doctrine

The "declared law" doctrine, as explained *supra,* must be applied here. The producers and pipelines acted upon the temporaries, as issued. They expended funds in justifiable reliance upon those unconditioned temporary certificates. The pipelines have become dependent, in part, upon the connected sources of supply to meet their market requirements.

The Commission previously determined, on February 5, 1963, that it would be proper to permit the producers to abandon service, if they chose, rather than submit to a new refund obligation imposed upon their unconditioned temporary certificates. However, the Commission at the same time held that this alternative would "clearly be contrary to the public interest" because:

> "... It would jeopardize the pipeline's existing gas supply from these sources, and place them in a position where, even if they could replace the gas with other supply, their investment in facilities here would be lost and new expenditures required without concomitant benefit to the public. It would also leave the producers, all of whom received temporary authorizations only upon a showing of emergency conditions, with no assurance that they could secure new outlets for their gas." (29 FPC at 224).

The Commission, in declining to engraft refund conditions, forthrightly rejected the course of entrapment. It relied on the "certainty" rule of *Sunray Mid-Continent* and refused to place itself "in a position of having induced producers to dedicate their gas to the market on one set of conditions, and then imposing more

stringent conditions upon them"[38] 29 FPC at 225.

The reasoning in the Order of February 5, 1963, is no less pertinent today. Without more, it establishes that fundamental justice would be subverted by the belated imposition of a refund condition, here and now, in Movant's unconditioned temporary certificate.

The application of the "declared law" doctrine, as urged by Movant, will have no untoward effects for the future. As the prior "declared law" expressed in *Sunray Mid-Continent* was conceived to be very clear at the date of the Commission Order of February 5, 1963, so now will the change in "declared law" effected by *Skelly* guide interested parties *prospectively.*

Indeed, assuming the validity of *Skelly,* the industry is clear- "on notice" of *Skelly,* with regard to the meaning and effect of unconditioned temporary certificates issued after January 23, 1964. In all events, the Commission, itself, as indicated *supra* in Footnote 35, has acted to forclose any recurrence of the instant problem by requiring, pursuant to general order, the inclusion of *express* conditions in all new temporary certificates.

The *retroactive* application of *Skelly,* on the other hand,

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[38] The brief for the Commission in *Skelly* accurately assessed the nature of the attempts to impose after-the-fact-of-issuance refund conditions; it summarized the character of these attempts by succinctly stating that "[i]t is apparent therefore that the claim for refunds is an afterthought." (Brief for Respondent Federal Power Commission, *Public Service Commn. of the State of New York v. FPC,* Case Nos. 17582, *et al.,* CADC, p. 31).

would destroy any semblance of administrative integrity and regularity in the case of unconditioned authorizations issued under the ascendency of contrary Commission authority, when *Sunray Mid-Continent* provided all concerned with judicial guidance.

Certainly, changes in interpretation and "policy" are inevitable concomitants of the administrative process. Indeed, flexibility in decision-making is a distinct advantage enjoyed by the administrative agency, and may even be one of the principal reasons for agency existence. However, an absence of restraint in the retroactive application of decision-making may well, over the long term, impair and defeat the very flexibility which the administrative body requires for the fruition of its function. Finally, the yielding to retroactive decision-making may possibly secure short-term advantages, but such are obtained at large cost — in destroying the finality of definitive orders, price stability is eliminated and any reliance for business planning purposes is undercut.

The considerations advanced with regard to price stability and reliance for business planning purposes are very important in the gas industry. The producer in almost all instances commits its gas to the pipeline purchaser under a long-term sales contract, typically for a 20-year term or the life of the producing leases involved. The producer recognizes the pricing risks that are inherent in his regulated activity; the Commission may condition his temporary certificate at the time of issuance, to govern sales under temporary authority, and, later, may condition his permanent certificate to govern sales thereafter. But these "built-in" risks which are inherent in Commission regulation of the natural gas industry

should not be compounded by retroactive price-conditioning. The producer, in making a decision respecting the commitment of his gas to the regulated market, must be able to assess his risk for the purposes of business planning by examining the plain language of written Commission orders in the context of governing "declared law." The alternative is chaos and confusion in the agency and industry alike.

VII. CONCLUSION

The Court of Appeals held that the Commission lacks statutory power to order refunds under the unconditioned temporary certificates in Nos. 60-62, 80, and 97, this Term; the Court below found *Skelly* to be an erroneous expression of the Commission's power under the Natural Gas Act, relying instead upon the principles of *Sunray Mid-Continent*. These separate Court of Appeals decisions should be affirmed on the ground of want of power in the Commission. So also should the decision below in Nos. 227 and 415 be affirmed.

However, even if the Court of Appeals erred on the question of power, the results there reached on the issue of refunds were correct and should be affirmed on the basis of the "declared law" doctrine. *Skelly*, in all events, should not be applied retroactively to unsettle previous transactions concluded under the earlier prevailing construction of the Natural Gas Act revealed by *Sunray Mid-Continent*.

Respectfully submitted,

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